FILE COPY

FI
APR
CHARLES EL

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 599

McCORMICK & COMPANY, INC., AND DURHAM BROS., INC., *Appellants*,

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA ET AL., *Appellees*.

Brief on Behalf of Appellants, McCormick & Co., Inc., and Durham Bros. Co., Inc.

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for Appellants.

[illegible] Printing Co., Law Printers, Charleston, W. Va.

SUBJECT INDEX

	Page
Reference to Opinion of District Court	1-2
Jurisdiction	2
Statement of Facts	3-5
Statement of Issue	5-6
Specifications of Error	6-7
Outline of Argument	8-12

ARGUMENT

I. History of Federal Legislation on the Interstate Transportation of Intoxicating Liquors	13-23
II. Appellants' Products are Not "Intoxicating Liquors" Within the Meaning of the Federal Statutes Petaining to the interstate Transportation of "Intoxicating Liquors"	23-31
III. The Webb-Kenyon Act Applies Only When There is an Intent to Violate the Laws of the State into Which the Liquor is Being Transported	31-36
IV. The West Virginia Statutes Applicable to this Case are Based Upon the Webb-Kenyon Act and Are to be Construed with Reference Thereto	36-41

V. The Products Sold and Shipped by the Appellants in Interstate Commerce to Licensed Dealers in West Virginia, Are Not "Liquors" within the Meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia ---------- 42-44

VI. If the Webb-Kenyon Act be Held to be Repealed by Implication, West Virginia Statutes on the Importation of Intoxicating Liquors are Not Applicable Appellants' Products Sold Only to Licensed Dealers in West Virginia------ 45-46

VII. If the State of West Virginia, Under the Concurrent Power Clause of the 18th Amendment, has the Authority to Forbid the Interstate Shipment into West Virginia of all Products which the State Deems to be "Liquors", Regardless of the Absence of an Intent to Violate its Laws, the State of West Virginia Has Not Exercised that Authority ---------- 47-48

VIII. The Requirement of a Permit and the Exaction of the $50.00 Annual Permit Fee, as Applied to Non-Resident Dealers and Manufacturers, is an unlawful Burden on Interstate Commerce -------- 48-49

TABLE OF CASES.

Page

Adams Express Co. v. *Kentucky*, 238 U. S. 190, 35 S. C. 824, 59 L. Ed. 1257, L. R. A. 1916 C. 273, Ann. Cas. 1915 D. 1167, 8, 9, 12, 16, 24, 32, 40, 49

Bailey v. *Clark*, 21 Wall. 284, 22 L. Ed. 651 9, 26

Bowman v. *Chicago, etc. Ry. Co.*, 125 U. S. 465, 8 S. C. 689, 31 L. Ed. 799 12, 24, 48

Chicago B. & Q. R. Co. v. *Giles*, 235 Fed. 804 10, 35

Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311, 37 S. C. 180, 61 L. Ed. 326 40

Commonwealth v. *Nickerson*, 236 Mass. 281, 128 N. E. 273 46

Ex Parte George Pratt, 83 W. Va. 51, 97 S. E. 301 8, 18

Hamm Brewing Co. v. *Chicago, R. I. & P. Ry. Co.*, 215 Fed. 672 10, 34

Gerber v. *Shoenfield*, 43 Fed. (2) 225 12, 24, 49

In re Rahrer, 140 U. S. 545, 11 S. C. 865, 35 L. Ed. 572 8, 14

Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284 9, 11, 26, 42

Johnson v. *So. Pkg. Co.*, 196 U. S. 1, 25 S. C. 158, 49 L. Ed. 363 9, 26

Leisy v. *Hardin*, 135 U. S. 100, 10 S. C. 681, 34 L. Ed. 128 ..... 8, 12, 14, 24, 49

Monroe Cider, Vinegar & Fruit Co. v. *Riordan*, 280 Fed. 624 (C. C. A. 2d Ct.) 9, 26

National Prohibition Cases, 253 U. S. 350, 40 S. C. 468, 64 L. Ed. 946 ..... 8, 19

New Jersey Bell Tel. Co. v. *State Board of Taxes and Assessment of New Jersey*, 280 U. S. 338, 50 S. C. 11, 74 L. Ed. 463 ..... 12, 24, 49

Palmer v. *Southern Express Co.*, 129 Tenn. 116, 165 S. W. 236 ..... 10, 33

Pollard v. *Commonwealth*, 132 Va. 576, 110 S. E. 354 ..... 8, 18, 22

Rhodes v. *Iowa*, 170 U. S. 412, 18 S. C. 664, 42 L. Ed. 1088 ..... 8, 15

Smith v. *Southern Express Co.*, 166 N. C. 155, 82 S. E. 15 ..... 10, 35

Southern Express Co. v. *State*, 188 Ala. 454, 66 So. 115 ..... 9, 34

Sutherland, Statutory Construction (2d Ed.) Sec. 443 ..... 9, 26

Sprout v. *South Bend*, 277 U. S. 163, 48 S. C. 502, 72 L. Ed. 833 ..... 12, 49

State of W. Va. v. *Adams Express Co.*, (Cir. Ct. App. 4th Ct.), 219 Fed. 794 ..... 29, 39

State v. *Doe*, 92 Kans. 212, 139 Pac. 1169 ..... 10, 35

State v. *Haymond*, 20 W. Va. 18 ..... 11, 42, 43

State v. *Herring*, 145 N. C. 418, 58 S. E. 1007 40

State v. *Miller*, 89 W. Va. 84, 108 S. E. 847 11, 42, 43

State v. *Muncey*, 28 W. Va. 494, (dissenting opinion) 11, 42

State v. *Patterson*, 134 N. C. 612, 47 S. E. 808 40

State v. *United States Express Co.*, 164 Iowa 112, 145 N. W. 451 10, 36

Sturgeon v. *State*, 17 Ariz. 513, 154 Pac. 1050 10, 32

United States v. *Hill*, 248 U. S. 420, 39 S. C. 143, 63 L. Ed. 337 8, 17

United States v. *Lanza*, 260 U. S. 377, 44 S. C. 141, 67 L. Ed. 314 45

United States v. *Oregon-Washington R. & N. Co.*, 210 Fed. 378 10, 36

United States v. *Phes Co.*, 28 Fed. (2d) 106 (C. C. A. 9th Ct.) 9, 26

Vane v. *Newcombe*, 132 U. S. 220, 10 S. C. 60, 33 L. Ed. 310 9, 26

Van Winkle v. *State*, 4 Boyce (Del. 578, 91 Atl. 385 10, 34

Vigliotti v. *Pennsylvania*, 258 U. S. 403, 42 S. C. 330, 66 L. Ed. 686 45

Woods v. *Seattle*, 270 Fed. 315 46

Young v. *State*, 137 Miss. 188, 102 So. 161 11, 42

CONSTITUTION AND STATUTES:

Wilson Act, 27 USCA Section 121 (1931 Cumulative Supp.) 13

Webb-Kenyon Act, 27 USCA Section 122 (1931 Cumulative Supp.) 15

Reed Amendment, 27 USCA Section 123 (1931 Cumulative Supp.) 17

18th Amendment to Constitution of United States 18

27 USCA Section 4 20

27 USCA Section 12 19

27 USCA Section 13 20

27 USCA Section 52 19

Appendix A.

Section 46, Article 6, Constitution of West Virginia 50

Section 1, Article 1, Chapter 60, 1931 Code of West Virginia 50

Section 5, Article 1, Chapter 60, 1931 Code of West Virginia 51

Section 11, Article 1, Chapter 60, 1931 Code of West Virginia 53

Section 3, Article 2, Chapter 60, 1931 Code of West Virginia 54

Appendix B.

Section 4, Article 1, Chapter 60, 1931 Code of West Virginia 55

Section 9, Article 1, Chapter 60, 1931 Code of West Virginia 56

Section 13, Article 1, Chapter 60, 1931 Code of West Virginia 58

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 599

McCORMICK & COMPANY, INC., AND DURHAM BROS., INC., *Appellants,*

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA ET AL., *Appellees.*

Brief on Behalf of Appellants.

I.

THE OPINION OF THE COURT BELOW.

The opinion rendered in this case by the United States District Court for the Southern District of West Virginia has not been officially reported at the time of the preparation of this brief. The opinion, which was

rendered by a court of three judges convened pursuant to Section 266 of the Judicial Code, as amended, (28 USCA Section 380), appears on page 56 of the Record.

II.

JURISDICTION.

Appellants have complied with Paragraph 1 of Rule 12 of this Court, and have hereinbefore filed their printed statement showing jurisdiction. We rely upon that statement to sustain jurisdiction, and in addition thereto desire to make a further statement as to equity jurisdiction.

Appellees have not challenged the equity jurisdiction of the District Court. Appellants rely upon three grounds to establish equity jurisdiction:

(1) The enforcement of the unlawful and unconstitutional rules and regulations of the defendant prohibition commissioner would irreparably injure or destroy the interstate business of the appellants and those on whose behalf they sue. (R. 6, 43, 44)

(2) The absence of a remedy at law to recover the license taxes or fees, if paid. (R. 7.)

(3) The necessity of resorting to equity to avoid a multiplicity of suits. (R. 7, 8.)

STATEMENT OF FACTS.

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by McCormick & Company, Inc., and Durham Brothers Company, Inc., who sue on behalf of themselves and certain other non-resident manufacturers and wholesale dealers in products sold exclusively for medicinal, mechanical, toilet and culinary purposes, containing ethyl alcohol as a necessary solvent and preservative, against the appellees, W. G. Brown, Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia. (R. 1, 37, 42, 47). The appellants, and those on whose behalf they sue, who hold permits, issued by the United States Bureau of Industrial Alcohol and approved by the United States Bureau of Prohibition, to manufacture and sell products containing ethyl alcohol, seek to restrain the appellees from requiring appellants to obtain permits from the State Prohibition Commissioner, and pay therefor an annual license fee of $50.00, before being permitted to sell and ship their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell said products, and to enjoin the appellees from instituting actions to prevent or interfere with the sale of said products by appellants. (R. 1, 4, 5, 7 and 8).

Under the rules and regulations of the defendant State Prohibition Commissioner, non-resident manufacturers doing business in West Virginia are classed and treated as wholesale dealers, (R. 27), and all non-

resident wholesale dealers are required to secure permits before being permitted to sell and transport their products in interstate commerce into West Virginia. (R. 26).

The defendant Prohibition Commissioner refuses to permit any resident dealer to purchase, sell or offer for sale any flavoring extracts, toilet articles, perfumes or other merchandise containing ethyl alcohol, when such products are manufactured or sold by any person or firm without the State of West Virginia, unless such person or firm has a permit issued by the Commissioner of Prohibition of West Virginia to manufacture or sell such articles. Furthermore, the State Prohibition Commissioner and his agents have threatened and do threaten to seize and confiscate any such articles which a resident dealer should buy, sell, or offer for sale, unless the manufacturers of said articles hold permits from the State Prohibition Commissioner. (R. 6, 43).

Affidavits submitted by appellants establish the fact that none of their products containing ethyl alcohol are fit for use or are capable of being used for beverage purposes. (R. 37, 42, 44, 45, 46). The appellees have introduced an affidavit to the effect that these products are such as will produce intoxication, and are intoxicating in fact (R. 48).

The defendant State Prohibition Commissioner bases his right to require appellants to secure said permits upon certain rules and regulations published and established by him, as such State Prohibition Commissioner, and enforced by him and the defendant Attorney Gen-

eral under the alleged authority of Chapter 60 of the 1931 Code of West Virginia. (R. 25, 26, 27).

It is the contention of the appellants that Chapter 60, 1931 Code of West Virginia, does not confer such authority and that the action of the State Prohibition Commissioner, in requiring them to secure said permits and pay an annual license fee therefor of $50.00, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia, who are authorized by the State Prohibition Commissioner to receive, store and sell the same, constitutes an unlawful interference with interstate commerce, and violates the commerce clause of the Constitution of the United States. (R. 7)

The Judge of the District Court in which the suit was pending convened a court of three judges, under the provisions of Section 266 of the Judicial Code, as amended, (28 USCA Section 380). The Court of three judges, upon the hearing of the cause, held that the action of the defendant State Prohibition Commissioner in requiring said permits, was constitutional, denied an interlocutory and permanent injunction, and dismissed this suit. (R. 54).

STATEMENT OF ISSUE.

The sole issue presented in this case is whether the defendant State Prohibition Commissioner, by the enforcement of certain rules and regulations prescribed by him under the alleged authority of Chapter 60,

1931 Code of West Virginia, can require the appellants and those on whose behalf they sue, to obtain permits from the State Prohibition Commissioner and pay therefor an annual license fee of $50.00, before being permitted to sell and ship their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell the same.

SPECIFICATIONS OF ERROR.

1. The district court erred in refusing to grant the prayer of appellants' bill of complaint for a permanent injunction.

2. The district court erred in refusing to enjoin the defendants, W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, from requiring or attempting to require by legal or equitable process, or otherwise, the appellants in this cause and those on whose behalf they sue, to secure permits from the appellee, W. G. Brown, Commissioner of the State of West Virginia, and to pay for said permits an annual license fee, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by the said State Prohibition Commissioner to sell said products.

3. The district court erred in refusing to hold that the action of the defendant, W. G. Brown, State Prohibition Commissioner of the State of West Virginia,

in requiring the appellants and those on whose behalf they sue, to secure from said State Prohibition Commissioner permits and pay therefor an annual license fee, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by said Prohibition Commissioner to sell said products, constitutes an unlawful interference with the interstate business of the appellants.

4. The district court erred in holding that under the provisions of the Wilson Act, Webb-Kenyon Act, Reed Amendment, the Eighteenth Amendment to the Constitution of the United States, Volstead Act, and Section 46, Article 6 of the Constitution of West Virginia, and Chapter 60, 1931 Code of West Virginia, the defendant W. G. Brown, State Prohibition Commissioner of West Virginia, was warranted in requiring the appellants and those on whose behalf they sue, to secure from said defendant Prohibition Commissioner annual permits and to pay therefor an annual license fee of $50,00, before being allowed to sell and transport their products in interstate commerce to dealers in West Virginia holding licenses from the defendant State Prohibition Commissioner to receive, store and sell the same.

OUTLINE OF ARGUMENT.

I. **History of Federal Legislation on the Interstate Transportation of Intoxicating Liquors.**

Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128.

27 USCA Sec. 121 (1931 Cumulative Supplement).

In re Rahrer, 140 U. S. 545, 35 L. Ed. 572.

Rhodes v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088.

27 USCA Sec. 122 (1931 Cumulative Supplement).

Adams Express Co. v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267.

27 USCA Sec. 123 (1931 Cumulative Supplement).

United States v. *Hill*, 248 U. S. 420, 63 L. Ed. 337.

Ex parte George Pratt, 83 W. Va. 51, 97 S. E. 301.

18th Amendment to the Constitution of the United States.

National Prohibition Cases, 253 U. S. 350, 64 L. Ed. 946.

27 USCA Secs. 4, 12, 13 and 52.

Pollard v. *Commonwealth*, 132 Va. 576, 110 S. E. 354.

II. Appellants' Products are Not "Intoxicating Liquors" Within the Meaning of the Federal Statutes Pertaining to the Interstate Transportation of "Intoxicating Liquors."

27 USCA Sec. 4.

27 USCA Sec. 13.

Sutherland, Statutory Construction (2d Ed.) Sec. 443.

Vane v. *Newcombe,* 132 U. S. 220, 33 L. Ed. 310.

Bailey v. *Clark,* 21 Wall. 284, 22 L. Ed. 651.

Johnson v. *So. Pkg. Co.,* 196 U. S. 1, 49 L. Ed. 363.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan,* 280 Fed. 624 (C. C. A. 2d Ct.)

United States v. *Phez Co.,* 28 Fed. (2d) 106 (C. C. A. 9th. Ct.)

Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284.

III. The Webb-Kenyon Act Applies Only When There is an Intent to Violate the Laws of the State Into Which the Liquor is Being Transported.

Adams Express Co. v. *Kentucky,* 238 U. S. 190, 59 L. Ed. 1267.

Southern Express Co. v. *State,* 188 Ala. 454, 66 So. 115.

Palmer v. *Southern Express Co.*, 129 Tenn. 116, 165 S. W. 236.

Smith v. *Southern Express Company*, 166 N. C. 155, 82 S. E. 15.

Sturgeon v. *State*, 17 Ariz. 513, 154 Pac. 1050.

Van Winkle v. *State*, 4 Boyce (Del.) 578, 91 Atl. 385.

Chicago, B. & Q. R. Co. v. *Giles*, 235 Fed. 804.

Hamm Brewing Company v. *Chicago, R. I. & P. Ry. Co.*, 215 Fed. 672.

State v. *United States Express Co.*, 164 Iowa 112, 145 N. W. 451.

State v. *Doe*, 92 Kans. 212, 139 Pac. 1169.

United States v. *Oregon-Wash. R. & N. Co.*, 210 Fed. 378.

IV. The West Virginia Statutes Applicable to this Case Are Based Upon the Webb-Kenyon Act and Are to be Construed with Reference Thereto.

Secs. 1, 5 and 11, Art. 1, Ch. 60, 1931 Code of West Virginia.

Sec. 3, Art. 2, Ch. 60, 1931 Code of West Virginia.

V. The Products Sold and Shipped by the Appellants in Interstate Commerce to Licensed Dealers in West Virginia, Are Not "Liquors" with-

in the Meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia.

State v. *Miller*, 89 W. Va. 84, 108 S. E. 847.
Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284.
Young v. *State*, 137 Miss. 188, 102 So. 161.
State v. *Muncey*, 28 W. Va. 494, (dissenting opinion).
State v. *Haymond*, 20 W. Va. 18.

VI. If the Webb-Kenyon Act be Held to be Repealed by Implication, West Virginia Statutes on the Importation of Intoxicating Liquors are Not Applicable to Appellants' Products Sold Only to Licensed Dealers in West Virginia.

Sec. 11, Art. 1, Ch. 60, 1931 Code of West Virginia.

VII. If the State of West Virginia, Under the Concurrent Power Clause of the 18th Amendment, Has the Authority to Forbid the Interstate Shipment into West Virginia of all Products Which the State Deems to be "Liquors", Regardless of the Absence of an Intent to Violate its Laws, the State of West Virginia Has Not Exercised that Authority.

Section 11, Article 1, Chapter 60, 1931 Code of West Virginia.

VIII. The Requirement of a Permit and the Exaction of the $50.00 Annual Permit Fee, as Applied to Non-Resident Dealers and Manufacturers, is an unlawful Burden on Interstate Commerce.

Bowman v. *Chicago, etc. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700.

Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128.

Adams Express Company v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267.

New Jersey Bell Telephone Company v. *State Board of Taxes and Assessment of the State of N. J.*, 280 U. S. 338, 74 L. Ed. 463.

Gerber v. *Shoenfield*, 43 Fed. (2d) 225.

Sprout v. *South Bend*, 277 U. S. 163, 171, 72 L. Ed. 833, 837.

ARGUMENT

I. History of Federal Legislation on the Interstate Transportation of Intoxicating Liquors.

As heretofore indicated, the defendant State Prohibition Commissioner relies upon the provisions of Chapter 60, 1931 Code of West Virginia, (Appendices A and B of this brief), as the authority for his requirement that the appellees secure a permit and pay therefor an annual fee before being permitted to sell and transport their products in interstate commerce to licensed dealers in West Virginia. We do not believe that Chapter 60 can be so construed. Moreover, if it will admit of such a construction, it is unconstitutional as constituting an unlawful interference with interstate commerce.

A history of Federal legislation pertaining to the interstate transportation of *intoxicating liquors* affords considerable aid in interpretating the provisions of Chapter 60.

The first Federal statute on the subject was the Wilson Act passed by Congress on August 8, 1890. That act was as follows:

> "All fermented, distilled, or other intoxicating liquors transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory

enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

27 USCA Sec. 121 (1931 Cumulative Supplement).

The Wilson Act was passed by Congress to meet the decision in *Leisy* v. *Hardin,* 135 U. S. 100, in which this Court held that the State of Iowa, in the absence of congressional permission, had no authority to prohibit the sale of liquor in original packages in the hands of importers from other states in that state; and that as intoxicating liquors were recognized by Congress as legitimate articles of interstate commerce, such interstate traffic could not be controlled by the laws of the State amounting to the regulation thereof. This Court said that "the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restrictions upon the State in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

In the case of *In re Rahrer,* 140 U. S. 545, upholding the constitutionality of the Wilson Act, this Court said, "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted

no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In *Rhodes* v. *Iowa*, 170 U. S. 412, this Court held that the Wilson Act did not have the effect of permitting interstate shipments of liquor to come under the operation of the State laws until after their delivery to the consignee, and therefore one having received liquor shipped in interstate commerce obtained the right to use the same, although he no longer had the right to sell it free from the restrictions imposed by the laws of the State. To meet this situation, Congress, on March 1, 1913, passed the Webb-Kenyon Act, which reads as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United State, or place noncontiguous to but subject to the jurisdiction there-

of, is hereby prohibited."

27 USCA Sec. 122 (1931 Cumulative Supplement).

The Webb-Kenyon Act did not assume to deal with all interstate commerce shipments of intoxicating liquors in the States, but was only applicable to cases in which the intoxicating liquor was *intended* by any person interested therein to be received, sold or in any manner used, in the original package, or otherwise, in violation of any law of the State into which shipment was made. *Adams Express Company* v. *Kentucky*, 238 U. S. 190. In that case this Court said:

> "It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

This Court concluded that inasmuch as the liquor in question was to be transported in interstate commerce for the personal use of the consignee, which use had been declared by the supreme court of Kentucky not to be in violation of the laws of Kentucky, the Webb-Kenyon Act had no application, and the state could not regulate such interstate shipment.

On March 4, 1917, Congress passed the Reed Amendment, which was as follows:

> "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be fined not more than $1,000 or imprisoned not more than six months, or both: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State; Provided further that the provisions of this section are made applicable to the District of Columbia."
>
> 27 USCA Sec. 123 (1931 Cumulative Supplement).

In *United States* v. *Hill*, 248 U. S. 420, sustaining the constitutionality of the Reed Amendment, this Court said, in part:

> "In view of the authority of Congress over the subject-matter, and the enactment of previous legislation embodied in the Wilson and Webb-Kenyon Laws, we have no question that Congress

> enacted this statute because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the State (West Virginia) saw fit to permit the introduction of liquor for personal use in limited quantity in nowise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy. * * *"

It is quite generally held that the Reed Amendment did not repeal the Webb-Kenyon Act. *Ex Parte George Pratt*, 83 W. Va. 51, 97 S. E. 301; *Pollard* v. *Commonwealth*, 132 Va. 576, 110 S. E. 354.

The next Federal enactment on the subject of intoxicating liquors was the Eighteenth Amendment to the Constitution, which reads as follows:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several

states shall have concurrent power to enforce this article by appropriate legislation."

The constitutionality of the 18th Amendment was upheld in the *National Prohibition Cases*, 253 U. S. 350.

On October 28, 1919, Congress passed the Volstead Act, Sections 12 and 52 of which read as follows:

> "That no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> "Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided and the Commissioner may, upon application, issue permits therefor. * * *"
>
> 27 USCA Sec. 12.
>
> "All provisions of law that are inconsistent with this chapter are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquors, shall be construed as in addition to existing laws, * * *"
>
> 27 USCA Sec. 52.

Until the passage of the Volstead Act, there had been no definition of intoxicating liquor specifically written by Congress, although the term had been used in each

of the Congressional enactments bearing upon this subject. In the Volstead Act, however, Congress defined intoxicating liquor for the first time and in the following terms:

> "When used in this title (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *"

27 USCA Sec. 4.

It was further provided in Sec. 13 of the Volstead Act, that,

> "The articles enumerated in this section shall not after having been manufactured and prepared for market, be subject to the provisions of this chapter if they correspond with the following descriptions and limitations, namely:
>
> (*a*) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.
>
> (*b*) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.
>
> (*c*) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.
>
> (*d*) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for beverage purposes.

(*e*) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(*f*) Vinegar and preserved sweet cider.

"A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this chapter and as directed by the commissioner. No such manufacturer shall sell, use or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

"Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 46 of this chapter. * * *"

27 USCA Sec. 13.

In *Pollard* v. *Commonwealth*, 132 Va. 576, 110 S. E. 351, it was held that the Webb-Kenyon Act has not been repealed by the Eighteenth Amendment or Volstead Act. The Court said in this connection:

> "The object of the amendment (18th amendment) was not to curtail the powers of Congress, but to confer upon Congress powers which it did not theretofore possess; nor, as pointed out in the Allen Case, *supra*, was it the intention of the amendment to take away the police powers of the state over the subject of intoxicating liquor. So far as Congress was concerned, the amendment was a grant of power and not a restriction or a curtailment of existing powers. Prior to the amendment Congress had full power, under the commerce clause, to regulate or prohibit the transportation of intoxicating liquors in interstate commerce. This power it exercised by the Webb-Kenyon Act, which prohibited absolutely and entirely the transportation of ardent spirits into any state from a point without that state in violation of any law of said state * * *. This statute was enacted in aid of state statutes on prohibition, and enabled such states to absolutely prohibit the bringing into the state of intoxicating liquors for use therein. The power of Congress to regulate or prohibit the transportation of intoxicating liquors in interstate commerce was fully covered by the commerce clause of the Constitution, and that power was not taken away or curtailed by the 18th Amendment. There is nothing in that amendment which takes away from Congress the power to enact any statute deemed necessary to make prohibition effective, nor to prohibit the states from enacting such laws as may be necessary for the same purpose, provided only that the state laws do not affect offenses

against the United States created by act of Congress. The 10th Amendment of the United States Constitution expressly provides that: 'The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people.' So much of the Webb-Kenyon Act as is not in conflict with the Volstead Act is still kept in force by Section 35 of the Volstead Act (41 Stat. 317), declaring that: 'All provisions of the law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to the existing laws.' Under the Webb-Kenyon Act, the state had ample power to prevent the importation of intoxicating liquor from without its borders * * *. This provision of that act is still in force, and consequently may still be taken advantage of by the state. Section 39 of the prohibition act of this state is not in conflict with the 18th Amendment or the Volstead Act, and is still in force."

II. Appellants' Products are Not "Intoxicating Liquors" Within the Meaning of the Federal Statutes Pertaining to the Interstate Transportation of "Intoxicating Liquors."

In construing the provisions of Chapter 60, 1931 Code of West Virginia, with reference to Federal legislation relating to the transportation of *intoxicating liquors*, one of the vital questions raised is whether under the laws of the United States, articles of merchandise made in accordance with Federal formulæ, and unfit for beverage purposes, are legitimate articles of com-

merce, or whether they are contraband articles, the interstate character of which has been divested by any act of the Federal Congress.

Assuming that the products manufactured by the appellants, and by those on whose behalf they sue, are legitimate articles of commerce and that they move in interstate commerce, subject to no special disabilities, there can be no question but that any regulation of any State officer, requiring a permit, or license, or certificate, or any fee to be paid in order that they may be sold in West Virginia, constitutes a burden upon interstate commerce and is unlawful. And, of course, any statute which authorizes a state officer to make any regulation requiring a permit, license, certificate or fee to be paid in order that they may be sold in West Virginia, is unconstitutional and void.

Bowman v. *Chicago, etc. Ry. Co.*, 125 U. S. 465, 8 S. C. 689, 31 L. Ed. 799.

Leisy v. *Hardin*, 135 U. S. 100, 10 S. C. 681, 34 L. Ed. 128.

Adams Express Company v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267.

New Jersey Bell Telephone Company v. *State Board of Taxes and Assessment of the State of N. J.*, 280 U. S. 338, 74 L. Ed. 463, 50 S. C. 11.

Gerber v. *Shoenfield*, 43 Fed. (2d) 225.

We may then consider whether the products manufactured by the appellants, and those on whose behalf they sue, are legitimate articles of commerce, subject to no special disability.

The appellees have attempted to subject them to the same disability to which *intoxicating liquors* are amenable, by reason of Federal legislation bearing upon the traffic in *intoxicating liquors*. The only justification upon which the appellees can rely is that the products of the appellants are intoxicating liquors within the meaning of the laws of the United States. Obviously, the State of West Virginia can not legislate for Congress. Congress has seen fit to withdraw from the protection of the commerce clause of the Constitution certain products, to-wit, intoxicating liquors, and Congress has remanded the control of these products, after they enter a State, to the authority of the State, free from the protection normally afforded articles moving in interstate commerce. The State, however, can exercise its authority only with respect to articles from which Congress has withdrawn the protection of the commerce clause, and the State can not define the term "intoxicating liquors" so as to enlarge its scope and thereby attempt to regulate interstate commerce in articles over which Congress has not relinguished its exclusive authority. So, in order to determine whether the appellees, acting under the alleged authority of the State statutes of West Virginia, have the right to charge a fee and require the procuring of a license, certificate or permit by the appellants in order that the appellants may sell their products interstate in West Virginia, it must appear that the products of the appellants are intoxicating liquors within the meaning of the laws of the United States.

The term "intoxicating liquor" as used in Federal statutes enacted prior to the passage of the Volstead

Act must be defined in the light of the definition as used by Congress in the Volstead Act.

> "All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act."
>
> *Sutherland, Statutory Construction* (2d Ed.) Sec. 443.
>
> In accord: *Vane* v. *Newcombe,* 132 U. S. 220.
>
> *Bailey* v. *Clark,* 21 Wall. 284.
>
> *Johnson* v. *So. Pkg. Co.,* 196 U. S. 1.
>
> *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan,* 280 Fed. 624 (C. C. A. 2d Ct.)
>
> *U. S.* v. *Phez Co.,* 28 F. (2d) 106 (C. C. A. 9th Ct.)

The above consideration determines the question as to the meaning of the term "intoxicating liquors" as used in the various Federal enactments relating to intoxicating liquor prior to the Volstead Act. The Volstead Act, by its very terms (27 USCA Sec. 13), provides that flavoring extracts, medical preparations, proprietary medicines and the like are not intoxicating liquors. However, the term "intoxicating liquors" has been subjected to judicial determination in a number of decisions. In the *Intoxicating Liquor Cases,* decided in 25 Kansas 751, 37 Am. Rep. 284, Justice Brewer had before him the statute of Kansas prohibiting the sale and manufacture of any "spirituous, malt, vinous, fermented or other intoxicating liquors" and "all other liquors or mixtures thereof, by whatever name called,

that will produce intoxication." Various defendants were being prosecuted for the sale of flavoring extracts, perfumes and the like by virtue of this statute. The Court held:

> "The section, whose language is unfortunately chosen, is the one which has provoked this litigation and has tended to create so much prejudice against the statute; for its letter reaches to preparations which no man can believe were within the intent of the legislators, and interference with whose sale, if within the power of the legislature, would be felt by every one to be unnecessary and unreasonable. Alcohol is the intoxicating principle, the basis of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication. Hence, whatever liquor contains alcohol is within the statute. So reads its letter. But when we come to inquire as to the liquors which contain alcohol, we find a lengthy list of fluids which are never used as beverages. Cologne, extract of lemon, bay rum, paregoric, tincture of gentian and many other medicinal preparations contain alcohol, and will produce intoxication. They are seldom used as a beverage, and yet they may be. Intoxication produced by drinking bay rum has been known. Yet few will drink it. Its uses are for the toilet. But three of the prosecutions before us are for the sale of bay rum, extract of lemon and tincture of gentian, respectively * * *. Now what was the evil sought to be remedied by this statute and the constitutional amendment of which it was the outgrowth? It was the use of intoxicating liquors as a beverage. As counsel for defendants aptly and forcibly express it, 'the movement, of which the amendment and the statute were the expression and the result, was not

> a crusade against cologne and extract of lemon' * * * it was no attack on bay rum, camphor or tincture of lemon; it was intended to strike at certain liquors and mixtures only as were in ordinary and known use as intoxicating beverages, or which, in the failure to obtain such beverages, it could be reasonably and fairly believed would be used as substitutes. It seems that this intent and object of the law must be taken into consideration as an important element in its construction, and while some particular preparation or patent medicine might possibly, in a few cases, with a few exceptional constitutions, produce effects similar to intoxication—at an enormous risk of the health or life perhaps—the real question and test to which each 'liquor' or 'mixture' is to be submitted is about this: 'Is there a reasonable danger that this will be used as or as an equivalent substitute for an intoxicating beverage?' The law should receive a reasonable construction equally removed, on the one hand, from a fanatical coloring, and on the other hand, from a tendency to fritter it away'."

The Court in this case went on to declare that only articles which can normally be used as intoxicating liquors, and are fit for beverage purposes, were referred to in the statute, and held that extract of lemon, cologne, bay rum and the like were not intoxicating liquors within the meaning of that law.

The opinion is quoted at length because of the eminence of Justice Brewer, and because of the clear and forceful reasoning employed on a problem very similar to that which is now before this Court.

There have been no cases decided wherein the court

has undertaken to say whether such products as those manufactured and sold by the appellants are intoxicating liquors within the meaning of the acts of Congress prior to the Volstead Act. All of the cases concerning the Wilson Act, the Webb-Kenyon Act and the Reed Amendment involved the sale of beverage liquor, such as whiskey, wine, gin and beer. There has never before been an attempt on the part of a State to tax and regulate non-resident manufacturers and wholesalers dealers in flavoring extracts, medicines, perfumes, etc. The fact that there has never been such a case as the one before this Court would seem of itself to indicate the construction which has heretofore been given these liquor statutes.

Some exceedingly significant remarks have, however, been made by the Federal Courts in dealing with the Wilson Act and the Webb-Kenyon Act.

In the case of *State of West Virginia* v. *Adams Express Co.*, 219 Fed. 794, it was held:

> "That Congress has power to outlaw and exclude absolutely or conditionally, from interstate commerce, intoxicating liquors or any other deleterious substance has very often been decided. * * * The distinction is between things *deleterious* and things *beneficial* or *innocuous*. The power to regulate is the power to make reasonable regulations, or restrictions or exclusions. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat." (Italics ours.)

The action of the State Prohibition Commissioner, in requiring non-resident firms to secure liquor dealers'

licenses as a prerequisite to shipping their products into West Virginia in interstate commerce is an unlawful burden on interstate commerce; and if the necessary construction of any West Virginia statute requires the State Prohibition Commissioner to exact such liquor dealer's license from non-resident firms, then that statute is unconstitutional and void. The sole power which a state might have to regulate or exclude any merchandise shipped in interstate commerce, must of necessity, be based upon a Federal statute granting it that right. The only statutes which could possibly apply to this case would be the statutes relating to the traffic in intoxivating liquors, and the term "intoxicating liquors" as used in these statutes can not be construed as including flavoring extracts, perfumes, and medicinal preparations such as the appellants wish to ship into West Virginia.

There being no Federal definition of intoxicating liquors broad enough to include such products, and there being on the other hand, in Section 4 of the Volstead Act, (27 USCA Sec. 4) a definition of intoxicating liquors specifically excepting articles not fit for beverage purposes, and there being in Section 13, (27 USCA Sec. 13) of the Volstead Act, a further provision excepting by name, flavoring extracts, toilet preparations and the like, which are made in accordance with approved formulæ, and unfit for beverage purposes, we therefore assert that there is no authority to be found in the statutes of the United States which would permit a state to exclude from, or regulate interstate commerce in the products of the appellants. The affidavits of appellants show that their products are *unfit for beverage purposes,*

and the affidavit filed by the appellees does not deny this fact. (R. 37, 42, 44, 45, 46, 48)

Chapter 60 of the 1931 Code of West Virginia, provides that all manufacturers, wholesalers and dealers in "liquors" as defined by that statute, must secure licenses from the State Prohibition Commissioner before dealing in their products in West Virginia. This can only be construed to require such manufacturers and dealers as are within the jurisdiction of the state, to secure such permits; because, were the statute to be given any broader construction, it would be clearly unconstitutional as authorizing a restraint upon interstate commerce. For the definition of a term used in a Federal statute, we must construe that and other Federal statutes on the same subject-matter. A state has no power to extend the scope of Federal legislation either under the guise of a definition or in any other way. The action of the State Prohibition Commissioner thus exceeds any authority which any state statute of West Virginia could give him, and amounts to an unlawful and unwarranted interference with commerce between the states.

III. The Webb-Kenyon Act Applies Only Where There is an Intent to Violate the Laws of the State Into Which the Intoxicating Liquor is Being Transported.

Assuming that the products sold and shipped by the appellants in interstate commerce to licensed dealers in West Virginia are *intoxicating liquors* within the meaning of the federal laws pertaining to the interstate trans-

portation of *intoxicating liquors*, there is no Federal statute or law which can be said to take away from the products of the appellants the protection afforded by the commerce clause of the United States Constitution. The Webb-Kenyon Act is the only one of the Federal statutes or laws enacted prior to the 18th Amendment which could possibly be construed to have that effect. And that statute is only applicable when there is an *intent* upon the part of someone interested in the *intoxicating liquors* that they shall be received, sold or used in violation of the state law into which the shipments are being made. No such intent can be imputed to the appellants.

The leading authority as to the effect of the Webb-Kenyon Act upon interstate shipments of intoxicating liquor is *Adams Express Company* v. *Kentucky*, 238 U. S. 190, which has been cited and quoted in our discussion of Federal legislation. The interpretation there placed upon the act, that it only divests intoxicating liquors of their interstate character when the liquor is intended by any person interested therein to be possessed, sold or used in violation of the law of the State into which it is shipped or transported, has met with universal approval by the Federal and State courts which have considered the question.

In *Sturgeon* v. *State*, 17 Arizona 513, 154 Pac. 1050, the defendant, Sturgeon, was convicted upon a charge of bringing intoxicating liquors into the State of Arizona. Upon the trial of the case, the defendant sought to prove that he brought the liquor into the state for his personal use. The trial court refused to permit the in-

troduction of this evidence. In reversing the case, the Supreme Court of Arizona said:

> "It not being unlawful in the State of Arizona to have or personally use intoxicating liquors, its introduction into the State for personal use is not prohibited by the Webb-Kenyon Act, and the prohibition amendment, in so far as it attempts to interdict its shipment, transportation or introduction into the State for a lawful purpose is ineffectual as an attempt to regulate interstate commerce. It follows that the lower court committed error in refusing appellee's offer of evidence to show that he had brought the liquor into the State for his own personal use."

In *Palmer* v. *Southern Express Company*, 129 Tenn. 116, 165 S. W. 236, the Supreme Court of Tennessee, in construing the Webb-Kenyon Act in conjunction with the State prohibition statutes of Tennessee, said:

> "It is perceived that the thing which the Act (Webb-Kenyon) prohibits is the interstate shipment or transportation of the liquors mentioned therein, when 'intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the State, etc., into which the shipment is made'. It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold, or used in violation of any law of the State; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill confessed by the demurrer, and agreed on the record at the hearing in the court below, that the liquors were purchased for the personal use of complain-

ant and his family. This was lawful and indeed permitted by the statute in question.

In *Van Winkle* v. *State*, 4 Boyce (Delaware) 578, 91 Atl. 385, the Supreme Court of Delaware held that the Webb-Kenyon Act does not divest intoxicating liquor of its interstate character in all cases, but removes the protection of the commerce clause only when the liquor is to be sold, used or possessed in violation of any law of the State into which it is shipped.

In *Southern Express Co.* v. *State*, 188 Ala. 454, 66 So. 115, the Supreme Court of Alabama said:

> "The above act, (Webb-Kenyon) by its terms, does not prohibit the transportation of intoxicating liquor from one state into another state except upon the contingency that the liquor is to be *received*, *possessed*, or *kept*, or in some way used in a manner prohibited by the laws of the state into which such liquor is to be, or is in fact, imported. The above act, by its terms, divests intoxicating liquor of its 'interstate character,' and withdraws from it 'interstate protection' at the hands of the federal government only when it is shipped from one state into another state for purposes, which, under a valid statute of the state into which it is shipped, are illegal in the state into which it is shipped. In other words, under the terms of the above quoted act, intoxicating liquor, as an article of interstate commerce, is not an outlaw. It is however, as such an article, under certain conditions, an outlaw."

In *Theo Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co.*, 215 Fed. 672, the Court said:

> "The Webb-Kenyon Law declares unlawful

the shipment of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state, into which it is shipped. The beer which Moss, a resident of Iowa, ordered from the Plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa. The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-Kenyon Law, while it says that the liquor must not be received, possessed, sold, or used in violation of law, does not say that it shall not be transported in violation of the law. If it has been the intention of Congress to prohibit the procurement from points outside of the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments.

"Assuming, as I do, that the law is valid, I hold that it does not apply to this case."

Additional decisions supporting the rule laid down in *Adams Express Co.* v. *Kentucky*, supra, are:

State v. *Doe*, 92 Kansas 212, 139 Pac. 1169.

Chicago, B. & Q. R. Co. v. *Giles*, 235 Fed. 804.

Smith v. *Southern Express Co.*, 166 N. C. 155,

82 S. E. 15.

State v. *United States Express Co.*, 164 Iowa 112, 145 N. W. 451.

United States v. *Oregon-Wash. R. & N. Co.*, 210 Fed. 378.

We have asserted that the products of the appellants are not "liquors" within the meaning of the Webb-Kenyon or any other Federal statute. But even if they were so considered, still the foregoing authorities demonstrate the inapplicability of the Webb-Kenyon Act to the products shipped by appellants in interstate commerce to dealers in West Virginia holding permits from the State Prohibition Commissioner authorizing the sale thereof. There being no intent by any one interested in the "liquors" to sell, use or possess the same in violation of the laws of the State of West Virginia, these products are legitimate articles of commerce. They are recognized as such by the National Prohibition Act. (R. 37, 42.) 27 USCA Secs. 4 and 13.

IV. The West Virginia Statutes applicable to this case are based upon the Webb-Kenyon Act and are to be construed with reference thereto.

The West Virginia laws and statutes applicable to this case are Section 46, Article 6, Constitution; Sections 1, 5 and 11, Article 1, and Section 3, Article 2, Chapter 60, 1931 Code of West Virginia. (Appendix A of this brief.)

The controlling statute pertaining to this case is section 11. It will be noted that the substance of Section

11 is quite similar to the language employed in the Webb-Kenyon Act. The italicized words "when *such liquors,* mixture, compound or preparation are *intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State*" are taken almost verbatim from the Webb-Kenyon Act. The entire West Virginia Code was re-enacted as of January 1, 1931.

The context of Section 11 is a clear legislative recognition that the Webb-Kenyon Act has not been repealed, and the expression of a legislative intent that the prohibition laws of West Virginia were only meant to include cases coming within the scope of that act, namely, where the non-resident dealer sells *liquors* to a person or firm in West Virginia, and such *liquors* are *intended* by any person interested therein to be received, sold, possessed or in any manner used in violation of the laws of West Virginia.

Therefore, even though the appellants' products were "liquors" or other preparations described in Section 11, the sales and shipments made in interstate commerce to licensed dealers in West Virginia would not come within the scope of this statute, because there is no *intent* to violate the West Virginia prohibition laws. To hold otherwise would be equivalent to saying that the Webb-Kenyon Act and this West Virginia statute patterned after that act, apply regardless of the *intent* to violate the West Virginia statutes.

It is interesting to note that in this section of the statute, non-resident vendors, dealers, etc., are specifically referred to, whereas in Section 5 of the statute

which requires the licensing of manufacturere, dealers, etc., selling exempted products in West Virginia, there is no reference to non-residents.

Counsel for appellees contend that the following statutes are also applicable, namely, Sections 4, 9 and 13, of Article 1, Chapter 60, 1931 Code of West Virginia. (Appendix B of this brief.)

Section 4 is applicable only to "liquors, or absinthe or any drink compounded with absinthe." It includes within its scope such *liquors* as whiskey, wine or beer or other *drinks* which cannot be sold under permit. The same is true of Section 9. This fact is recognized by the defendant, State Prohibition Commissioner, in his ruling issued on January 1, 1931. (R. 19). In referring to "Class A" (preparations that may not be sold under permit), the State Prohibition Commissioner states that " 'Class A' comprehends 'liquors' in the same legal sense as whiskey, wine or beer, and comes within the inhibition of Sections 4 and 9, Art. 1 of the Prohibition Law." (R. 22). The severity of the penalty prescribed for the violation of Section 4, is indicative that such was the legislative intent. It is clear that Sections 4 and 9 have no application to the present case.

Counsel for appellees rely upon that part of Sections 4 and 11, which provides that, "In case of such sale or furnishing in which a shipment or delivery of such liquor is made by a common carrier, or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein delivery thereof is made by such carrier." This clause was originally a part of what is now Section 4. It was omitted from that Sec-

tions 4 and 11 has the effect of making a point within sion of the Code. It is contended that this part of Sections 4 and 11 has the effect of making a point within West Virginia the place of the sale of appellants' products. *State of West Virginia* v. *Adams Express* Company, 219 Fed. 794, (Cir. Ct. App., 4th Cir.), is cited in support of this contention.

The *Adams Express Company Case* is readily distinguishable from the one at bar. In that case the court had under consideration what is now Section 4, Article 1, Chapter 60, 1931 Code. (*Section 11 was not then a part of the Code.*) But the *liquor* therein involved—beer—was a liquor within the scope of Section 4. In that case the Express Company contended that as the beer was intended for the personal use of the consignee, and as the West Virginia statute did not prohibit the personal use of liquor, the Webb-Kenyon Act was inapplicable, and therefore, the State could not interfere with the interstate shipment. The Circuit Court of Appeals for the Fourth Circuit held that as the Webb-Kenyon Act prohibited the shipment or transportation of *liquor* from one state into another, not only when it was intended to be sold or used in violation of any law of such state, but also when it was to be *received* or *possessed* in violation of the state law; and, as the state law prohibited the receipt or delivery of the *liquor*, the shipment came within the scope of the Webb-Kenyon Act. The court held further that as there was an *intent* to *receive* the *liquor* contrary to the laws of West Virginia, that part of what is now Section 4, making the place of delivery the place of sale, was applicable. It is worthy of note that the two decisions cited by the

Correction to be made on page 39 of brief for appellants. Line 1 from top for, "tions 4 and 11 has the effect of making a point within sion of the Code", read, "tion prior to 1923, but was restored by the 1931 Code".

court to sustain this last holding, namely, *State* v. *Herring*, 145 N. C. 418, 58 S. E. 1007, and *State* v. *Patterson*, 134 N. C. 612, 47 S. E. 808, were both cases involving intrastate shipments. It is clear from this decision that before such a statute making the place of delivery the place of sale can be held applicable there must be an intent to violate the laws of the state into which the shipments are being made. If this were not so the decision of the Circuit Court of Appeals would be in conflict with that of this Court in *Adams Express Co.* v. *Kentucky*, 238 U. S. 109, cited and quoted, supra. In that case the sale of *intoxicating liquors* was prohibited in Kentucky, and the statute of Kentucky provided that the place of delivery of intoxicating liquors should be the place of sale. The shipment was made from Tennessee into Kentucky. This Court impliedly held that this statutory provision was inapplicable in view of the fact that the liquor was transported for personal use, which was not at that time prohibited by the Kentucky law.

Counsel for appellees contend that in *Clark Distilling Company* v. *Western Maryland Ry. Co.*, 242 U. S. 311, this Court refused to follow its holding in the *Adams Express Company Case*, to the effect that before the West Virginia statute making the place of delivery the place of sale can be made applicable there must be an intent to violate the laws of West Virginia. It will be observed that at the date of the decision in the *Clark Distilling Company Case* the West Virginia statute had been amended so that the receipt of liquor for personal use was expressly forbidden. This Court said in that connection: "As the relief sought is the

permanent right to ship into the state, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution." This decision must be read in the light of that fact. It is true that this Court said that the Webb-Kenyon Act must be deemed to be applicable whether or not the state expressly forbade the individual use of liquor. This part of the decision was based upon the theory that as the state statute prohibited the *receipt* and *possession* of *liquor*, and as the Webb-Kenyon Act applied to shipments the *receipt* and delivery of which were barred by the state, the act was applicable to that case regardless of the use to be made of the *liquor*.

The contention of the appellees that the latter part of Section 11 (Section 4 is not applicable to this case) making the place of delivery the place of sale, applies, regardless of the intent of the appellants to sell and transport their products only to dealers in West Virginia holding permits from the State Prohibition Commissioner to receive, sell and possess the same, is, therefore, clearly untenable. It is only when there is an *intent* to violate the laws of West Virginia that this provision of Section 11 can be given effect. The wording of this section indicates that such was the legislative intent.

Section 13, Article 1, Chapter 60, 1931 Code of West Virginia, (Appendix B of this brief), is inapplicable to this case because the resident dealers to whom appellants sell their products are authorized to receive them.

V. The Products Sold and Shipped by the Appellants in Interstate Commerce to Licensed Dealers in West Virginia, Are Not "Liquors" Within the Meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia.

As the appellants only ship their products in interstate commerce to *licensed dealers* in West Virginia authorized by the State Prohibition Department to receive, store and sell the same, there is, of course, no intent upon the part of the appellants to violate the laws of West Virginia. It becomes apparent, therefore, that the question as to whether these products are "liquors" within the meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia (Appendix A of this brief), is not a controlling factor in this case. It is clear, however, that appellants' products are not "liquors" within the meaning of that section.

Section 1 refers to *beverages* that will produce intoxication.

State v. *Miller,* 89 W. Va. 84, 108 S. E. 847.
Intoxicating Liquor Cases, 25 Kans. 751, 37.
Young v. *State,* 137 Miss. 496, 102 So. 161).
State v. *Muncey,* 28 W. Va. 494, (dissenting opinion).
State v. *Haymond,* 20 W. Va. 18.

In *State* v. *Muncey,* 28 W. Va. 494, a conviction for the sale of the essence of cinnamon without a state license was upheld. However, the conviction was affirmed by a divided court, two of the judges being for affirm-

ance and two for reversal. In a very persuasive dissenting opinion, Judge Woods said in part:

> "There is nothing in the legislative history of Virginia or of this State to indicate that essence of cinnamon, or any of essences, extracts or tinctures known to pharmacists, have ever been regarded as a drink of any kind, or that the same was ever supposed to be included in any of the drinks, for the sale of which a State license was ever required."

And in *State* v. *Haymond,* 20 W. Va. 18, the court in reversing a conviction based on the sale of gum-camphor, said:

> "It is certainly the evil of tippling that is designed to be prevented by our act, under which the indictment in this case was found. It was never before suggested to my mind, that the sale by a druggist of gum-camphor and alcohol mixed by him could in any way promote tippling. In almost every home will be found the 'camphor-bottle' containing gum-camphor dissolved in distilled spirits, and used exclusively as a medicine, and kept ready for use when needed, *but unpalatable as a beverage,* and never used as such. It certainly was never designed by the legislature to prohibit the sale of such mixture by the statute under which the indictment in this case was found." (Italics ours).

In *State* v. *Miller,* 89 W. Va. 84, 108 S. E. 847, the Supreme Court of West Virginia said:

> "The word liquors used in the prohibition statutes has a well defined significance. Section one defines the term, and it says just what it means

> when used in that law. No matter what the word may signify in other connections, its meaning in the prohibition laws is clearly and definitely determined to inhibit the manufacture and sale of a number of different *beverages*, and for convenience adopted one term which included all or any of them, and this is the use made of the word liquors in the law, so that when the word liquors is used it is limited in its meaning to the things mentioned in section one. By the very terms of section one it cannot be given any broader or narrower meanings." (Italics ours).

The affidavits introduced on behalf of the appellants establish the fact that their products are unfit for *beverage* purposes and that they will not produce intoxication. (R. 37, 42, 44, 45, 46). The only affidavit offered by the appellees states that some of these products will produce intoxication, but the affiant does not say that any of these products are fit for *beverage* purposes. (R. 48)

It follows, therefore, that the products of the appellants are not "liquors" within the meaning of said Section 1; and that the action of the State Prohibition Commissioner in requiring the appellants to secure state permits before selling and shipping their products in interstate commerce to licensed dealers in West Virginia, constitutes an unlawful interference with interstate commerce.

VI. If the Webb-Kenyon Act Be Held to be Repealed by Implication, West Virginia Statutes Pertaining to the Interstate Sale and Shipment of "Liquors" are Not Applicable to Appellants' Products sold Only to Licensed Dealers in West Virginia.

It is our contention that the 18th Amendment did not repeal the Wilson Act, Webb-Kenyon Act or Reed Amendment, and that the concurrent power conferred upon the States to enforce the 18th Amendment was not intended to give the States any jurisdiction over the interstate transportation of *intoxicating liquors* in addition to or different from that conferred by the Webb-Kenyon Act. This has been recognized by Congress in the enactment of the Volstead Law (27 USCA Section 52), and by the Legislature of West Virginia in the enactment of its prohibition statutes, particularly Section 11, Article 1, Chapter 60, 1931 Code of West Virginia.

Counsel for appellants rely upon *United States* v. *Lanza*, 260 U. S. 377, as establishing a contrary proposition. In the *Lanza* Case this Court held that the Federal prohibition laws had not taken from the states their inherent right to legislate in a manner not conflicting with Federal legislation enacted to enforce the 18th Amendment, and further that a single act violative of both Federal and state prohibition laws could be an offense against each. The right of a state to interfere with interstate commerce was not involved in that case. The same is true of *Vigliotti* v. *Pennsylvania*, 258 U. S.

403; *Commonwealth* v. *Nickerson*, 236 Mass. 281, 128 N. E. 273; *Woods* v. *Seattle*, 270 Fed. 315, and similar cases relied upon by appellees.

There can be no doubt that a state may, in enforcing the 18th Amendment, enact such laws *effective within its own territory* as can be reasonably interpreted to aid such enforcement, and that in so doing the State may legislate more drastically than Congress. It may be possible, therefore, that in the exercise of this concurrent power the State of West Virginia can regulate and restrict *within its own borders* the sale of any commodity which it deems to be an intoxicating liquor. But we earnestly submit that the right of the state to interfere with the *interstate* transportation of *intoxicating liquors*, or that which it deems to be an intoxicating liquor, is still a restricted one. The State of West Virginia has no authority to interfere with interstate commerce in that which is not an *intoxicating liquor* within the meaning of the Federal laws pertaining to the interstate transportation of such liquors and the federal laws passed by Congress to enforce the 18th Amendment. And such federal laws apply only to intoxicating liquors which are to be sold and used for *beverage* purposes contrary to the laws of the state into which they are being shipped. The products sold and shipped by appellants to licensed dealers in West Virginia are not intoxicating beverages and are not intended to be sold or used contrary to the laws of West Virginia.

VII. If the State of West Virginia, Under the Concurrent Power Clause of the 18th Amendment, has the Authority to Forbid the Interstate Shipment into West Virginia of all Products Which the State Deems to be "Liquors", Regardless of the Absence of an Intent to Violate Its Laws, the State of West Virginia Has Not Exercised that Authority.

There is one proposition which is alone decisive of this case. For, if it should be held that the 18th Amendment repealed the Webb-Kenyon Act, that under the concurrent power clause of the Amendment the State of West Virginia has authority to forbid all interstate sales and shipments of what the State deems to be "liquors", regardless of the absence of an intent to violate the State laws, and that the products of the appellants and those on whose behalf they sue are "liquors" within the meaning of the West Virginia statutes, *the Legislature of West Virginia has not exercised that power.*

As heretofore indicated, the State Legislature, in enacting Section 11, Article 1, Chapter 60, 1931 Code of West Virginia, (the controlling statute applicable to this case), has adopted almost verbatim the material portions of the Webb-Kenyon Act, with the exception that the place of delivery of such "liquors" is designated as the place of sale. We have shown in our discussion of the Webb-Kenyon Act that this statutory provision making the place of delivery the place of sale is only applicable when there is an *intent* that the *liquors*

transported into West Virginia shall be received, sold or used in violation of the state law. There is no such *intent* upon the part of the appellants in the instant case because they only sell and transport their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell the same.

VIII. The Requirement of a Permit and the Exaction of the $50.00 Annual Permit Fee, as Applied to Non-Resident Dealers and Manufacturers, is an Unlawful Burden on Interstate Commerce.

We believe we have shown that the products sold and transported by appellants in interstate commerce to licensed dealers in West Virginia are recognized as legitimate articles of commerce by both the Federal and State laws pertaining thereto, and that any West Virginia statute which could be construed to destroy the legitimacy of such products as articles of interstate commerce would be unconstitutional. It follows, therefore, that the action of the State Prohibition Commissioner, in requiring the appellants and those on whose behalf they sue to secure permits and pay therefor an annual license fee of $50.00, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition to receive, store and sell the same, constitutes an unlawful interference with interstate commerce.

Bowman v. *Chicago, &c. Ry. Co.*, 125 U. S. 465.

Leisy v. *Hardin*, 135 U. S. 100.
Adams Express Co. v. *Kentucky*, 238 U. S. 190.
Gerber v. *Shoenfield*, 43 Fed. (2d) 225.
New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessment of the State of New Jersey*, 280 U. S. 338.
Sprout v. *South Bend*, 277 U. S. 115.

The decree of the District Court, entered on December 3, 1931, should be reversed, with directions to enter a decree granting a permanent injunction as prayed for in the appellants' bill of complaint.

Respectfully submitted,

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for McCormick & Co., Inc., and Durham Bros. Co., Inc.,
Appellants.

April 2, 1932.

APPENDIX A.

Sec. 46, Art. 6, Constitution of West Virginia:

"On and after the first day of July, One Thousand Nine Hundred and Fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state; *Provided, however*, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

Sec. 1, Art. 1, Ch. 60, 1931, Code of West Virginia:

"The word 'liquors,' as used in this chapter, shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this chapter; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing one-half of one per cent or more of alcohol, by volume, shall be deemed spirituous liquors, and all shall be

embraced in the word 'liquors,' as used in this chapter."

Sec. 5, Art. 1, Ch. 60, 1931, Code of West Virginia:

"The provisions of this chapter shall not be construed to prevent any one from manufacturing (other than by 'moonshine still'), from fruit grown exclusively in this State, non-intoxicating wine for his own domestic consumption; or to prevent the manufacture from fruit grown exclusively within this State of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale of pure grain alcohol, at wholesale, to druggists, hospitals, sanitariums, laboratories and manufacturers for medicinal, pharmaceutical, scientific and mechanical purposes, or of wine for sacramental purposes by religious bodies or to prevent the sale and keeping and storing for sale by druggists of wine for sacramental purposes by religious bodies, or any United States pharmacopœia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law; or to prevent the sale by druggists, through pharmacists, of pure grain alcohol for medicinal, scientific, pharmaceutical and mechanical purposes; or to prevent the use of such alcohol by physicians, dentists and veterinarians in the practice of their profession; or to prevent the medication and sale of pure grain alcohol according to formulæ and under regulations of the national prohibition act; or to prevent the purchase and use in the manufacture of medicinal preparations and compounds by wholesale druggists only of sherry wine in quantities not exceeding twenty-five wine gallons during any period of ninety days: *Provided*, That no one shall manu-

facture, sell, keep for sale, purchase or transport any liquors, as defined in section one of this article and as herein excepted, without first obtaining a permit from the commissioner of prop hibition so to do. Forms of application and permits shall be prepared by the commissioner and a fee for each permit issued shall be collected by him as follows:

"(*a*) All manufacturers of liquors and wholesale dealers therein shall pay a fee of fifty dollars for each permit; (*b*) all purchasers in wholesale quantities of ethyl alcohol in any form, whether pure, medicated, or denatured, for use as herein provided, shall pay a fee of ten dollars for each permit; (*c*) all purchasers in wholesale quantities of liquors as defined in section one of this article for sale at retail, except duly licensed druggists, shall pay a fee of two dollars for each permit; (*d*) all persons except duly licensed druggists registering stills and given permits to use the same for lawful purposes shall pay a fee of five dollars for each permit: *Provided,* That any still used only for the manufacture of chemicals including water in which the process of distillation is a common and necessary operation, and which still shall not be used for the distillation of ethyl alcohol in any form, shall be required to be registered, but the owner and operator thereof shall not be required to obtain a permit therefor, or to pay license tax thereon. No fee shall be required for a permit to obtain wine for sacramental or religious rites.

"Permits shall be issued for the calendar year and shall expire on the thirty-first day of December next following the issuance thereof. All moneys received by the commissioner under this

section shall belong to the State and shall be by him immediately paid into the state treasury: *Provided further,* That such liquors shall be manufactured, sold, kept for sale, transported and used under permits issued by the federal prohibition commissioner and in accordance with regulations issued in pursuance of the national prohibition act."

Sec. 11, Art. 1, Ch. 60, 1931, Code of West Virginia:

"It shall be unlawful for any railroad company, express company, aerial navigation company, bus company, taxi company, or any common carrier, or any officer, agent or employee of any of them, or any other person, to knowingly ship, carry, transport into, or deliver in this State, in any manner or by any means whatsoever, any malt, brewed, vinous or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to any person, corporation or firm within the territory of this State when such liquors, mixture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State.

"It shall be unlawful for any person, association or corporation to order, purchase, sell or cause any malt, brewed, vinous or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to be transported into this State or from one place to another within the State, when such liquors, mix-

ture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State.

"It shall be unlawful for any non-resident vendor, dealer or other person to sell or furnish any malt, brewed, vinous, or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to any person, corporation or firm within the territory of this State, when such liquors, mixture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State; and in case of such sale or furnishing in which a shipment or delivery of such liquors is made by a common or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee.

"Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than three hundred dollars for the first offense, and for the second or any subsequent offense he shall be fined not less than one hundred nor more than five hundred dollars and confined in jail not less than two nor more than six months."

Sec. 3, Art. 2, Ch. 60, 1931 Code of West Virginia:

"The manufacture of alcohol, wine, and other

liquors, and the sale of the same by the manufacturer, by wholesale druggists and other dealers shall be under the supervision of the commissioner and under such rules and regulations as he may from time to time prescribe."

APPENDIX B.

Sec. 4, Art. 1, Ch. 60, 1931 Code of West Virginia:

Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall sell, keep, store, offer, or expose for sale, or solicit or receive orders for, any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder and, upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second or any subsequent offense under this chapter, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years. Any person, except a common carrier, who shall act as the agent or employee of such seller, or person so keeping, storing, offering or exposing for sale such liquors, or act as the agent, or employes of the purchaser of such liquors, shall be deemed guilty of such selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

REVISERS' NOTE—The clause relative to the place of sale on delivery by a carrier is new.

Sec. 9, Art. 1, Ch. 60, 1931 Code of West Virginia:

"It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by section five of this article), fruit stands, news stands, room or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *Provided, however,* That nothing contained in this section shall prevent one, in his home, from having and there giving intoxicating liquors, lawfully acquired, to another who is not a minor, or a person of intemperate habits, or one who is addicted to the use of any narcotic drug, when such having or giving is in no way a shift, scheme or device to evade the provisions of this chapter, but the word "home," as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house: *Provided,* further, That no common carrier, for hire, nor other person, for hire, or without hire, shall bring or carry into this State, or carry from

one place to another within this State, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five of this article: *And provided further,* That in case of search and seizure, the finding of any liquors shall be prima facie evidence that the same are being kept and stored for unlawful purposes."

Sec. 13, Art. 1, Ch. 60, 1931 Code of West Virginia:

"It shall be unlawful for any person in this State to receive, directly or indirectly, intoxicating liquors from a common or other carrier. It shall also be unlawful for any person in this State to possess intoxicating liquors, received directly or indirectly from a common or other carrier in this State. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months: *Provided, however,* That druggists may receive and possess pure grain alcohol, wine, and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in section five of this article and section three, article two of this chapter."